"possess[ed] actual knowledge of the existence of the right or privilege, full understanding of its meaning, and *clear comprehension of the consequences of the waiver*." 403 F.3d at 300 (internal quotation marks and citation omitted); Pet. App. 70 (same). Adopting the reasoning of the panel decision that she had authored, Judge Jones stated her view that a State could reasonably have believed "between 1996 and 1998 that it had no sovereign immunity to waive" because the Americans with Disabilities Act (ADA), had purported to abrogate its immunity to claims under that statute. 403 F.3d at 301; Pet. App. 71. In her view, although "[t]he State voluntarily accepted federal funds" during that period, the purported abrogation of its immunity to ADA claims meant that "its acceptance [of federal funds] was not a 'knowing' waiver of immunity" to claims under Section 504. 403 F.3d at 301; Pet. App. 71.

This Court recently denied a petition for certiorari filed by Louisiana in *Pace*. See *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005).

5. The en banc court subsequently issued its decision in *Miller* (which consisted of three consolidated cases—two from Louisiana and one from Texas) on August 15, 2005, addressing three remaining challenges to the validity of conditioning the receipt of federal funds on a state agency's waiver of immunity to claims under Section 504. *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342 (5th Cir. 2005), cert. denied, No. 05-617 (Feb. 21, 2006).

First, the court of appeals rejected the States' contention that they did not waive their immunity to suits under Section 504 because the agencies that accepted the clearly conditioned federal funds were not autho-

rized to waive the States' immunity, though they were authorized to apply for and accept the conditioned funds. 421 F.3d at 347-348; Pet. App. 84-86. The court held that, by authorizing the state agencies to "accept the benefits of substantial sums of federal Spending Clause money burdened with the clearly stated condition under § 2000d-7 that acceptance waives immunity from suit in federal court" for suits under Section 504, the States effectively authorized the agencies to waive their Eleventh Amendment immunity. 421 F.3d at 348; Pet. App. 85.

Second, the court of appeals rejected Texas's challenge to Sections 504 and 2000d-7 on "relatedness" grounds. 421 F.3d at 348-349; Pet. App. 86-89. Texas argued that, because the federal funds its agency received were not funds provided directly under the Rehabilitation Act itself, the conditions in Sections 504 and 2000d-7 are not "reasonably related to the purpose of the expenditure to which they are attached" as required by the *Dole* test. See 421 F.3d at 348 & n.15; Pet. App. 86 & n.15. The court rejected that contention, holding that Congress's expressed interest in "eliminating disability-based discrimination" in federally-funded programs "flows with every dollar spent by a department or agency receiving federal funds." 421 F.3d at 349; Pet. App. 88-89 (quoting *Koslow* v. *Pennsylvania*, 302 F.3d 161, 175-176 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003)).

Finally, the court of appeals rejected Louisiana's argument that it did not "knowingly" waive its immunity by accepting federal funds because it might have thought at the time it took the funds that it did not have any immunity to waive. 421 F.3d at 350-352; Pet. App. 89-93. Although the State acknowledged that the same

argument had been rejected by the en banc court of appeals in *Pace*, it argued that this Court's recent decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), required the court to reconsider *Pace* because this Court in *Jackson* "repudiated th[e] 'clear statement rule' and replaced it with a 'notice' rule." 421 F.3d at 350-351; Pet. App. 90-91. The court of appeals refused to "read such a sweeping change into th[is] [C]ourt's opinion in *Jackson*," holding instead that the "clear and unambiguous" waiver condition in Sections 504 and 2000d-7 was sufficient to render a State's acceptance of federal funds a knowing waiver of immunity. 421 F.3d at 351; Pet. App. 92.

Judge Jones, joined by five other judges, concurred in part and dissented in part. Although all the judges agreed with the three holdings of the majority opinion, they filed a separate opinion to reiterate their disagreement with the majority opinion in *Pace*. 421 F.3d at 352; Pet. App. 94.

Although the Texas state defendants in *Miller* did not file a petition for certiorari, the Louisiana state defendants in *Miller* did. *Louisiana Dep't of Educ.* v. *Johnson*, No. 05-617. This Court denied the petition on February 21, 2006.

6. On August 25, 2005, a panel of the Fifth Circuit issued an unpublished opinion in the instant case affirming the district court's holding that the state agency defendant is not immune to plaintiff's claims under Section 504. Pet. App. 1-3. The court of appeals stated that all of the challenges to Sections 504 and 2000d-7 had been disposed of by the court's en banc decisions in *Pace* and *Miller*. *Id.* at 3.

ARGUMENT

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Barbour, 125 S. C
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01-1357); *Arkans*
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416 (2005) (No. 04-1655); *WMATA* v.
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v. *Vinson*, 537 U.S. 1104 (2003) (No.
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PA v. *Nihiser*, 536 U.S. 922 (2002) (No.
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ondition attaches to funds not distrib-

uted under the Rehabilitation Act itself. Those contentions are incorrect and, just as in the cases cited above in which this Court denied certiorari, do not warrant further review here.

1. *Knowledge.* Petitioner argues (Pet. 14) that it could not have "knowingly" waived its immunity to Section 504 claims, because "[a]lthough Section 2000d-7(a) demonstrates Congress's unmistakable desire that States be subject to suit in federal court, it is less than clear that Congress intended to accomplish that objective indirectly by conditioning waiver on the receipt of federal funds instead of directly by abrogation." Because Congress's intent is clear, that argument was correctly rejected by the court of appeals.

a. Petitioner concedes that Section 2000d-7 makes clear Congress's intent that state agencies accepting federal funds be subject to private suits to enforce Section 504. A State that has chosen to take federal funds under that provision therefore has knowingly waived its immunity. There is no separate requirement that Congress use any particular form of words when it is clear that Congress intended that, if a State takes federal funds, it will be foreclosed from asserting immunity. Every court of appeals to have considered the question has concluded that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1591 (2005); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2d Cir. 2001); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181

(2000); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005), cert. denied, 126 S. Ct. 416 (2005); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

Petitioner contends (Pet. 18) that "[t]he court of appeals's decision in *Pace* widens an existing split between the Second Circuit and every other circuit to consider whether Section 2000d-7(a) can form the basis of a knowing waiver." Petitioner's contention is mistaken. The Second Circuit in the case on which petitioner relies, *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98 (2001), stated unequivocally that "we agree with [the plaintiff] that [Section 2000d-7(a)] constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. Accordingly, all of the regional courts of appeals—including the Second Circuit—have agreed that Section 2000d-7(a) puts States on clear notice that agencies that accept federal funds will be subject to suit under Section 504.[1]

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[1] The Second Circuit in *Garcia* did disagree with the other circuits on a different point, resulting in the conclusion that the States retained immunity from suit under Section 504 for a period in the 1990s. The court in *Garcia* reasoned that, because a State may have believed that its immunity from suits for violation of Title II of the ADA was

b. Unlike statutes such as the ADA, which authorizes suits against States by abrogating state sovereign immunity defenses, Section 504 authorizes suits only against state agencies that receive federal funds,[2] only if the State voluntarily chooses to accept those funds, and only for the duration of the funding period.[3] Those

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abrogated by Section 2000d-7(a), and because the "proscriptions of Title II [of the ADA] and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits [under Section 504], since by all reasonable appearances state sovereign immunity had already been lost [to claims under Title II]." 280 F.3d at 114 (citation omitted). The petition for certiorari does not advance the *Garcia* rationale or argue that certiorari should be granted to consider whether that rationale is correct. In any event, as the United States explained in its brief in opposition to certiorari in *Louisiana State Bd. of Elementary & Secondary Educ.* v. *Pace*, 126 S. Ct. 416 (2005) (No. 04-1655), *Garcia* was wrong when it was decided, see U.S. Br. in Opp. at 17-21, *Pace*, *supra* (No. 04-1655); *Garcia* has in any event been overtaken by subsequent decisions of this Court in *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613 (2002), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004), see U.S. Br. in Opp. at 21, *Pace*, *supra* (No. 04-1655); and even aside from *Lapides* and *Lane*, the *Garcia* rule was a transitional rule and the Second Circuit would now recognize that a State's waiver of immunity from Section 504 suits would be valid for most or all cases currently being litigated and all cases that will arise in the future, see *id.* at 22-23.

[2] Section 504 applies only to States that accept federal funds. See 29 U.S.C. 794a(a)(2) (authorizing suits as part of remedies to "any person aggrieved by any act or failure to act by any *recipient of Federal assistance* * * * under [Section 504]") (emphasis added). Accordingly, under any reasonable interpretation of the statutes as a whole, Congress limited its attempted abrogation to those state agencies that receive federal financial assistance.

[3] A state agency is not subject to liability and suit under Section 504 in perpetuity if, at any time, it accepted federal funds. Instead, the state program must be "receiving Federal financial assistance" at the

differences are critically important. A state agency could read the ADA and conclude that Congress intended to abrogate its sovereign immunity to ADA claims regardless of any decision or action by the State. But Sections 504 and 2000d-7 are clearly conditional. They have effect if, and only if, the agency voluntarily chooses to accept federal funds. If the state agency does not take the funds, no plausible reading of those provisions would subject the agency to suit under Section 504.

Thus, when it was deciding whether to accept federal funds for the relevant funding year, petitioner's sovereign immunity to Section 504 claims for the coming year was intact, and the agency was faced with a clear choice. It could decline federal funds and maintain its sovereign immunity to suits under the Rehabilitation Act, or it could accept funds and be subject to private suits under Section 504. In choosing to accept federal funds that were clearly available only to those state agencies willing to submit to enforcement proceedings in federal court, petitioner knowingly waived its sovereign immunity.

2. *Relatedness.* Petitioner contends (Pet. 24-30) that Section 504 and Section 2000d-7 are improper exercises of Congress's Spending Clause authority, because the conditions those statutes place on recipients of federal funds are unrelated to the federal interest in the funds insofar as they apply to funds that are not distributed directly under the Rehabilitation Act itself. That contention is incorrect.

a. This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four requirements for valid enactments

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time of the alleged discrimination leading to the lawsuit. See 29 U.S.C. 794(a).

in exercise of the Spending power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* at 207. Second, if Congress places conditions on the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978)). Fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id.* at 208.

b. Petitioner claims (Pet. 24-30) that Section 504 and Section 2000d-7 fail to meet the third, "relatedness" requirement. Petitioner concedes that the courts of appeals have uniformly concluded that Section 504 and Section 2000d-7 satisfy *Dole*'s relatedness requirement. See Pet. 29 ("There is no circuit split on the question of Section 2000d-7(a) and *Dole*'s relatedness requirement."). Those statutes further the federal interest in ensuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons. Cf. *Sabri* v. *United States*, 541 U.S. 600, 606 (2004) ("Money is fungible," and it "can be drained off here because a federal grant is pouring in there.").

Section 504's nondiscrimination requirement is patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education

Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd.* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court held that Title VI was a valid exercise of the spending power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." *Id.* at 569 (citations omitted).[4] The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575.

Lau and *Grove City* stand for the proposition that Congress has a legitimate interest in preventing the use of *any* of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks and citation omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the re-

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[4] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), the Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not, however, cast doubt on the Spending Clause holding of *Lau*.

ceipt of public services, such as race, gender and disability. Because that interest extends to all federal funds, Congress validly drafted Title VI, Title IX, and Section 504 to apply across the board to all federal financial assistance.[5]

The requirement in Section 2000d-7 that a state funding recipient waive its Eleventh Amendment immunity as a condition of accepting federal financial assistance is also related to the same important federal interests. The United States relies on private litigants to assist in enforcing federal programs and, in particular, in enforcing federal nondiscrimination mandates. The requirement that state funding recipients waive their sovereign immunity to suits under Section 504 as a condition of accepting federal financial assistance both (1) provides a viable enforcement mechanism for individuals who are aggrieved by state funding recipients' failure to live up to the promises they make when they accept federal funds and (2) makes those individuals whole for the injuries they suffer as a result of the funding recipients' failure to follow the law.

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[5] This Court has repeatedly upheld conditions not tied to particular spending programs as valid exercise of Congress's Spending Clause powers. See *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, 20 U.S.C. 4071 *et seq.*, which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools' not denying "equal access" to students based on the content of their speech); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
WAN J. KIM
Assistant Attorney General
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

FEBRUARY 2006

In the Supreme Court of the United States

TEXAS DEPARTMENT OF PUBLIC SAFETY,
Petitioner,

v.

JULIE DUNLOP ESPINOZA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

RANCE L. CRAFT
Assistant Solicitor General

AMY WARR
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

No. _____

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AMY WARR
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

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United States Court of Appeals
Fifth Circuit
FILED
August 25, 2005
Charles R. Fulbruge III
Clerk

In the
United States Court of Appeals
for the Fifth Circuit

No. 02-11168
Summary Calendar

JULIE DUNLOP ESPINOZA,

Plaintiff-Appellee,

VERSUS

TEXAS DEPARTMENT OF PUBLIC SAFETY; ET AL.,

Defendants,

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

N° 3:00-CV-1975-L

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM: *

Julie Espinoza sued the Texas Department of Public Safety ("TDPS") for alleged violations of title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). Based on intervening decisions from the Supreme Court and this court,[1] Espinoza conceded that her ADA claim was barred by sovereign immunity[2] but maintained that her § 504 Rehabilitation Act claim for injunctive relief was not.

TDPS moved the district court to dismiss the § 504 claim on the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that title I of the ADA did not validly abrogate state sovereign immunity pursuant to Section Five of the Fourteenth Amendment); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) (holding that title II of the ADA and § 504 the Rehabilitation Act, which offer protections almost identical to those of the ADA, did not validly abrogate state sovereign immunity pursuant to Section Five of the Fourteenth Amendment).

2. Thereafter, on leave from the district court, Espinoza amended her complaint to assert an ADA claim against the director of the TDPS in his official capacity under *Ex Parte Young*, 209 U.S. 123 (1908), for which she sought prospective injunctive relief and attorney's fees. No challenge to this claim is presently before us.

basis of state sovereign immunity. Concluding that TDPS had waived its immunity from suit under § 504 of the Rehabilitation Act by accepting federal funds pursuant to 42 U.S.C. 2000d-7, the district court denied the motion to dismiss, and TDPS took this interlocutory appeal.

During the pendency of this appeal, we decided *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005) (en banc), which, as TDPS has appropriately acknowledged in supplemental briefing, forecloses all but two of its arguments for reversing the denial of sovereign immunity: (1) that despite accepting federal funds conditioned on a waiver of immunity, it does not have authority, as a matter of state law, t o waive immunity from suit in federal court; and (2) that §§ 504 and 2000d-7 fail the relatedness requirement set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987). Although not addressed in *Pace*, those contentions are now foreclosed by in *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 2005 U.S. App. LEXIS 17244 (5th Cir. Aug. 15, 2005) (en banc).

Therefore, based on these precedents, we AFFIRM the denial of TDPS's motion to dismiss on the basis of state sovereign immunity, and we REMAND this matter for further proceedings.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JULIE DUNLOP ESPINOZA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No.
	§	3:00-CV-1975-L
	§	
TEXAS DEPARTMENT OF	§	
PUBLIC SAFETY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the court is Defendant's Motion to Dismiss, filed November 15, 2001; Plaintiff's First Motion to Amend Complaint and Join Additional Party, filed December 5, 2001; and Plaintiffs Motion to Substitute Amended Complaint, filed February 11, 2002. After careful consideration of the parties' motions, responses, Plaintiffs complaint, and the applicable law, the court **denies** Defendant's Motion to Dismiss and **grants** Plaintiffs Motion to Substitute Amended Complaint.

I. Factual aand Procedural Background

Because of a childhood disease, Plaintiff Julie Dunlop Espinoza ("Espinoza") has a physical condition that requires her to walk with crutches or use a scooter for mobility. In May of 2000, Espinoza atteempted to renew her drivers license at the Department of Public Saffety ("DPS") office located in Mesquite, Texas where a DPS clerk cobserved Espinoza and later filed a report, stating that Espinoza hadd a condition, which might make her an unsafe driver. Based on thiss report, DPS told Espinoza she would have to take a comprehensiive examination to demonstrate her driving ability in order to renew her license.

On September 8, 2000, Espinoza filed this action against DPS, alleging thaat DPS' process for renewing drivers licenses discriminatedd against persons with disabilities. Specifically, Espinoza claaims that DPS' requirement that she submit to a comprehensiive examination to demonstrate her qualifications as a driver in order to renew her drivers license violated Title II[1] of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. § 12101, *et seq.* (1995) aand Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 794-794a (1999). In her original complaint, Espinoza sought a temporary and permanent injunction, declaratory relief, damages, and attorney's fees.

---

1. The ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), 42 U.S.C. §§ 12111-12117 (1995), and public services (Title II), §§ 12131-12165. At issue in this case is whether Eleventh Amendment immunity bars Title II suits under the ADA.

In November of 2001, DPS filed a motion to amend its answer to add the defense of sovereign immunity under the Eleventh Amendment and moved to dismiss the action in light of the United States Supreme Court's holding in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) that suits brought against state agencies pursuant to Title I of the ADA were barred by Eleventh Amendment immunity.[2] Shortly thereafter Espinoza filed two motions to amend her complaint. The parties then filed a joint motion to stay the proceedings to permit the parties to file briefs addressing DPS' motion to dismiss on the basis of sovereign immunity and Espinoza's motion to amend her complaint. The court granted the motion, staying the proceedings until a period of thirty days after the court ruled on the parties' motions.

II. Motion to Dismiss Standard

A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction

A motion to dismiss filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the subject matter jurisdiction of a federal district court. *See* Fed. R. Civ. P. 12(b)(1). A claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim. *See Home Builders Assoc., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, they lack the power to adjudicate claims. *See e.g., Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151(5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994)). Thus, a federal court must dismiss an action whenever it

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2. The Court did not decide whether Title II suits under the ADA were also barred by Eleventh Amendment immunity. *Garrett*, 531 U.S. at 358 n.1.

appears that subject matter jurisdiction is lacking. *Stockman*, 138 F.3d at 151.

In considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir.), *cert. denied*, 122 S.Ct. 1059 (2002). Thus, unlike a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court is entitled to consider disputed facts as well as undisputed facts in the record. *See Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986). Uncontroverted allegations of the complaint, however, must be accepted as true. *Den Norske Stats Oljeselskap As*, 241 F.3d at 424.

B. Rule 12(b)(6) Failure to State a Claim

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);*Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). Stated another way, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema*, 122 S.Ct. 992, 998 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190,

196 (5th Cir. 1996). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.*; *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

III. Analysis

Since the *Garrett* decision, the Fifth Circuit in *Reickenbacker v. M.J. Foster*, 274 F.3d 974, 976 (5th Cir. 2001), determined that claims against the State under Title II of the ADA and the Rehabilitation Act are also barred by immunity, based on the same reasoning and analysis applied in *Garrett*. *Reickenbacker*, 274 F.3d at 983-84. In light of the Fifth Circuit's holding in *Reickenbacker*, DPS contends that Espinoza's discrimination claims against DPS, a state agency, under Title II of the ADA and the Rehabilitation Act are barred by Eleventh Amendment immunity. DPS therefore argues that Espinoza's claims should be dismissed.

A. Section 504 of the Rehabilitation Act

Espinoza alleges in her original complaint that DPS "is an agency of the State of Texas that conducts programs or activities receiving Federal financial assistance as defined by the Rehabilitation Act...." She therefore argues that because DPS accepted federal funds it waived its Eleventh Amendment immunity defense under the Rehabilitation Act. In response, DPS contends that Espinoza's argument that DPS' receipt of federal funds waives Eleventh Amendment immunity was rejected by the United States Supreme Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). DPS therefore argues that the "mere receipt of